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AFRO-AMERICAN FAITH IN THE CIVIL RELIGION; OR, YES, I WOULD SIGN THE CONSTITUTION

RANDALL KENNEDY*

Professor Levinson has brilliantly demonstrated, on this and other occasions, that *every* text is ambiguous. His own paper is no exception. Take, for instance, his question: "What should we expect the black visitor to Philadelphia to do when invited to sign the Constitution?"¹

That question might be interpreted in at least three ways. It might be read to mean: What do we predict blacks will, in fact, do when asked to sign the Constitutional scroll? That is a useful question to ask because it invites us to consider black perspectives on the bicentennial. All too often the concerns of blacks and other disadvantaged groups are excluded from serious consideration. To his credit, Professor Levinson displays an unusual attentiveness to various perspectives, musing in his paper on the special meanings that the Constitution might have for women, the poor, the foreign-born, Catholics, and Jews, in addition to racial minorities.²

The question might be read to mean: What should we onlookers expect blacks to do when confronted with the choice of signing the Constitution in Philadelphia? On this reading, the focus is on the expectations of the observer-questioner instead of on the actions of the observed. This question is useful insofar as it invites inquiry into our beliefs about fellow black citizens, beliefs that may harbor ignorance or bias.

Finally, the question might be read to mean: What *should* blacks do when visiting the commemorative convention? Under this reading, the inquiry focuses on the appropriateness of various attitudes that blacks might adopt toward the bicentennial observance. This question, too, is useful insofar as it compels an inquiry into the

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1. Levinson, *Pledging Faith in the Civil Religion; Or, Would You Sign the Constitution?*, 29 WM. & MARY L. REV. 113, 129 (1987).

2. *Id.* at 133.

nature of the obligation that an oppressed people owes to the political community in which it is situated and under which it suffers.

In the context of Professor Levinson's paper, the third interpretation is probably the one he intended to pursue. However, considerations raised by the alternatives bear on my response to the normative question whether a black American in 1987 should sign the Constitution of 1787.

My response is yes, a black American should sign the commemorative scroll. One reason is largely instrumental. The Constitution, whatever its many possible meanings, is a powerful political symbol. Assuming that the black person in question is interested in advancing reforms that will lead to a greater degree of racial equality, she will want to mobilize the vast legitimating force of the Constitution in favor of her political agenda. In order to do this, she must submit herself to the Constitution's moral jurisdiction. That is why in the nineteenth century, even before the abolition of slavery, the overwhelming majority of politically active (that is, free) blacks professed their loyalty to the Constitution. In 1827, the country's first black-run newspaper declared that in its discussion of political subjects "we shall ever regard the Constitution of the United States as our political star."³

Nearly a quarter of a century later, the same sentiment predominated. Speaking in 1851 at the State Convention of Ohio Negroes during a debate on whether black men should vote under the United States Constitution, William Howard Day maintained that blacks should feel no embarrassment since the Constitution guaranteed that no person shall be deprived of life, liberty, or property without due process of law.⁴

Coming up as I do, in the midst of three millions of men in chains, and five hundred thousand only half free, I consider every instrument precious which guarantees to me liberty. I consider the Constitution the foundation of American liberties, and wrapping myself in the flag of the nation, I would plant myself upon that Constitution, and using the weapons they have given

3. R. DICK, *BLACK PROTEST: ISSUES AND TACTICS* 44 (1974) (quoting Freedom's J., March 16, 1827, at 1).

4. U.S. CONST. amend. V.

me, I would appeal to the American people for the rights thus guaranteed."⁵

Day, in other words, was prepared to use whatever patches of constitutional text were available as a staging ground for attacks on oppressive policies, even those firmly grounded in the constitutional text itself.

Blacks have long sought to demonstrate to their fellow white Americans that they consider themselves full-fledged participants in the American system and thus are entitled to the benefits and burdens of that identity. As part of that demonstration, blacks not only have "signed" the Constitution in the ceremonial sense that Professor Levinson urges us to take seriously, they have also signed in ways that entail consequences so dire that the seriousness of their gesture is inescapable. They have volunteered, for instance, to sign the Constitution with their blood in each of this nation's wars, hoping that in return their white countrymen would accord their rights greater respect.

I stated at the outset my agreement with the instrumental calculation that historically has led most blacks to pledge faith in the civil religion of American constitutionalism. Related to that calculation is a normative judgment about the evolving character of this elusive thing we call "the Constitution." At the center of this judgment is a vision of the Constitution as promise. This metaphor has a distinguished lineage in Afro-American political thought. In 1963, in his great address at the march on Washington, Martin Luther King, Jr., declared:

When the architects of our republic wrote the magnificent words of the Constitution and Declaration of Independence, they were signing a promissory note to which every American was to fall heir. This note was the promise that all men . . . would be guaranteed the unalienable rights of life, liberty, and the pursuit of happiness."⁶

5. 1 A DOCUMENTARY HISTORY OF THE NEGRO PEOPLE IN THE UNITED STATES 318 (H. Aptheker ed. 1951).

6. M.L. KING, JR., *I Have a Dream* in A TESTAMENT OF HOPE: THE ESSENTIAL WRITINGS OF MARTIN LUTHER KING, JR. 217 (J. Washington ed. 1986). Although Reverend King stated that "America has defaulted on this promissory note," he "refuse[d] to believe that there are insufficient funds in the great vaults of opportunity of this nation." *Id.*

The questions posed by King's observation are whether the nation has performed substantially on the Constitutional promise, or whether the performance has been so inadequate that it properly can be deemed a material breach, thereby discharging blacks of any continuing obligation.

Martin Luther King, Jr., correctly recognized that despite the disheartening tenacity of racial oppression in American life, there exists sufficient evidence of the possibility for social justice that adherence to the constitutional contract is both morally creditable and politically prudent. The movement he has come to symbolize—the liberation struggle of the southern Negro in the fifties and sixties—reflects the wisdom of his analysis. The movement's very existence was made possible in large degree by adherence on the part of federal and local officials to constitutional norms such as freedom of expression that provided demonstrators with protection against wholesale repression. As Reverend King observed in his first speech as a civil rights leader, "[t]he great glory of American democracy is the right to protest for right."⁷ Moreover, the remarkable achievements of the southern liberation struggle—the eradication of de jure segregation, the outlawing of "private" racial discrimination in places of public accommodation, the enfranchisement of southern black citizens, the suppression of semi-official racially motivated terroristic violence—demonstrate the capacity of the nation to implement significant reforms, even those demanded by groups at the bottom of the social hierarchy.

There are those, however, who will dispute my contention that racial oppression constitutes a deviation from the American way, as opposed to an embodiment of the American way, and who will reject as well my suggestion that blacks should sign the commemorative scroll. They will point to racial inequalities in every important aspect of our social life, from employment to education to housing, and, even worse, to the extraordinary indifference our political institutions consistently demonstrate toward these racially identifiable disparities. These long-standing inequities nourish an important strain in the tradition of Afro-American political thought that differs profoundly from the advice I offer. In 1847

7. D. GARROW, *BEARING THE CROSS: MARTIN LUTHER KING, JR., AND THE SOUTHERN CHRISTIAN LEADERSHIP CONFERENCE* 24 (1986).

Frederick Douglass gave voice to this alternative perspective when he declared:

I have no patriotism. I have no countryThe only thing that links me to this land is my family, and the painful consciousness that here there are three millions of my fellow-creatures, groaning beneath the iron rod of the worst despotism ever devised I cannot have any love for this country or for its Constitution. I desire to see its overthrow as speedily as possible, and its Constitution shivered in a thousand fragments.⁸

Another black abolitionist, William Wells Brown, voiced the same sentiments two years later. "I have no Constitution," said Brown, "and no country."⁹

These sentiments certainly are understandable given their source. As former slaves, Douglass and Brown knew the horrors of "the peculiar institution" with a special intimacy. Yet, approximately a century after the abolition of slavery by the thirteenth amendment,¹⁰ the elevation of the Negro to citizenship by the fourteenth amendment,¹¹ and the banning of racial exclusion in voting by the fifteenth amendment,¹² Malcolm X still expressed a feeling of radical estrangement from the American constitutional order. "I'm not an American," Malcolm X declared in 1964, "I'm one of the twenty-two million black people who are victims of . . . disguised hypocrisy. . . . I don't see any American dream; I see an American nightmare."¹³ Many blacks continue to see the United States in much the same light. They probably will not visit the bicentennial exhibit in Philadelphia, and if they do, they will likely decline to sign the commemorative scroll. Their sense of alienation tugs at me, their countryman and kinsman. But even as I note their pain with respect and empathy, I nonetheless will sign the symbolic version of our nation's basic charter. This paradoxical position is nothing new. It captures, in fact, what has always been the most distinctive feature of Afro-American experience in the United

8. R. DICK, *supra* note 3, at 59 (quoting *Liberator*, May 21, 1847, at 82).

9. *Id.* at 60 (quoting *National Anti-Slavery Standard*, Nov. 8, 1849, at 1).

10. U.S. CONST. amend. XIII.

11. U.S. CONST. amend. XIV.

12. U.S. CONST. amend. XV.

13. Malcolm X, *The Ballot of the Bullet*, in *THE VOICE OF BLACK AMERICA: MAJOR SPEECHES BY NEGROES IN THE UNITED STATES, 1797-1971*, at 988 (P. Foner ed. 1972).

States. W.E.B. DuBois described it as a "double-consciousness . . . an American, a Negro; two souls, two thoughts, two unreconciled strivings; two warring ideals in one dark body, whose dogged strength alone keeps it from being torn asunder."¹⁴

14. W.E.B. DuBois, *THE SOULS OF BLACK FOLK* 45 (1969).